Michael W. Cotter
Chief Disciplinary Counsel
P.O. Box 1099
Helena, MT 59624-1099
Tel.: (406) 442-1648
mwcotter@montanaodc.org

Office of Disciplinary Counsel

BEFORE THE COMMISSION ON PRACTICE OF THE

SUPREME COURT OF THE STATE OF MONTANA

* * * * * * * * * * * * *

IN THE MATTER OF JAMES E. SEYKORA,	Supreme Court Case No. _____
An Attorney at Law,	ODC File No. 17-107
Respondent.	**COMPLAINT**
	Rules 3.8(d), 8.4(d), MRPC

The Office of Disciplinary Counsel for the State of Montana ("ODC") hereby charges James E. Seykora with professional misconduct as follows:

General Allegations

1. James E. Seykora, hereinafter referred to as Respondent, was admitted to the practice of law in the State of Montana in 1972 at which time he took the oath required for admission, wherein he agreed to abide by the Rules of Professional Conduct, the Disciplinary Rules adopted by the Supreme Court, and

the highest standards of honesty, justice and morality, including, but not limited to, those outlined in parts 3 and 4 of Chapter 61, Title 37, Montana Code Annotated.

2. The Montana Supreme Court has approved and adopted the Montana Rules of Professional Conduct ("MRPC"), governing the ethical conduct of attorneys licensed to practice in the State of Montana, which Rules were in effect at all times mentioned in this Complaint.

3. In May 1984, Respondent joined the U.S. Department of Justice ("DOJ") as an Assistant United States Attorney ("AUSA") posted at the United States Attorney's Office ("USAO"), Billings, Montana. Throughout his tenure as an AUSA, Respondent focused on Organized Crime and Drug Enforcement Task Force cases. He retired from federal service in July, 2012.

4. On October 3, 2017, the United States Department of Justice, Office of Professional Responsibility ("OPR") referred Respondent to ODC as a result of its investigation into Respondent's alleged misconduct that occurred while he was an AUSA. In its Report of Investigation, it found that Respondent had engaged in professional misconduct and had violated the Montana Rules of Professional Conduct, including Rules 3.3(a)(1) and Rule 8.4(d), as well as the parallel rules contained in the United States Attorney's Manual.

5. Rule 11(A), RLDE, requires a formal Complaint to be filed within six years from the time the alleged misconduct is discovered. Pursuant to Rule

11(C)(3), RLDE, "[t]he six-year statute of limitations is tolled while: (3) Civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending with any governmental agency, court, or tribunal." OPR's investigation into Respondent's alleged misconduct was initiated in December, 2014 and was concluded in October, 2017, when OPR referred the matter to ODC. As a result, pursuant to RLDE 11(C)(3), the six-year statute of limitations was tolled during the time OPR was conducting its investigation into the conduct of the Respondent, and this complaint is timely filed with the Montana Supreme Court.

6. Central to the Respondent's misconduct was his disregard for the constitutional due process obligations imposed by *Brady v. Maryland*, 373 US 83, 87 (1963), and *Giglio v. United States*, 405 US 150, 154 (1972). *Brady* imposes on the government the obligation to provide the defendant with exculpatory material, i.e., evidence that would exonerate the accused; and *Giglio* imposes on the government the obligation to provide defendants with impeachment material, i.e. information that would impeach the credibility of a witness.

7. In 2006, Respondent prosecuted Heather Schutz ("Schutz") and Lashawn Johnson ("Johnson"): *United States v. Schutz*, USDC (MT), Cause No. CR-06-34-SPW, and *United States v. Johnson*, USDC (MT), Cause No. CR-06-79-BLG-DLC. The prosecutions were the result of a long term federal investigation

into the trafficking of illegal narcotics in the Billings, Montana area.

8. Following Schutz's arrest, she was debriefed a number of times by federal agents, during which she provided information beneficial to the government in its investigation and eventual prosecution of Johnson. Schutz was named the sole defendant in a two count Information: Count 1, narcotics conspiracy, and Count 2, possession of firearm in relation to a drug trafficking offense. Schutz pleaded guilty on March 29, 2006. The Plea Agreement provided for the possibility that she might be rewarded for her assistance to the government—it was filed under seal. On August 14, 2006, Respondent lodged a Motion to Reduce Sentence (5K1.1) on the basis that Schutz had provided ". . . truthful, complete, and reliable grand jury testimony resulting in an indictment." In fact, she had not testified before the Grand Jury, and there was no mention that she had provided truthful debriefing. She was rewarded for her cooperation, and the Federal District Court reduced her guideline sentence of 188 to 235 months for the drug conspiracy charge by roughly 30% -- to 140 months. She was also sentenced to 60 months on the gun charge to run consecutively, for a total of 200 months. The 5K1.1 Motion was filed under seal. Rule 35, F. R. Crim. P., provides a second opportunity for a further sentence reduction.

9. On June 26, 2006, a Grand Jury indicted Johnson on charges of narcotics conspiracy, substantive narcotics, and possession of a firearm in

furtherance of a drug trafficking crime. Johnson went to trial on November 27, 2011. Two weeks prior to trial, Respondent provided *Giglio* impeachment material to Johnson. In order to provide sealed documents to Johnson, a motion seeking leave to do so was filed with the Court. He produced the sealed Schutz Plea Agreement; however, he did not seek leave to produce the sealed Schutz 5K1.1 Motion to Reduce Sentence. As such, the sealed Schutz 5K1.1 Motion to Reduce Sentence was not produced or disclosed to Johnson, nor were all of the FBI 302 Reports of Schutz's debriefing, as well as other documents. Respondent also advised defense counsel that there was no Grand Jury testimony because the only witness who did testify was a federal agent, and he would not be called as a witness at trial. Johnson was convicted and sentenced to an aggregate sentence of 420 months imprisonment.

10. Three months earlier (August, 2006), Respondent represented to the trial court in the 5K1.1 Motion and at Schutz's sentencing hearing that Schutz testified before the grand jury. That was not a true statement. However, Respondent told Johnson's lawyer on the first day of trial that the government had no grand jury transcripts to disclose. At trial, Schutz testified. Respondent asked her a number of questions that were narrowly focused about her understanding of the plea agreement that allowed for a post-trial or future reduction of her sentence under Rule 35. He avoided asking any questions relating to the 5K1.1 Motion and

sentencing benefit that she received three months earlier. Johnson's lawyer asked no questions regarding the 5K1.1 Motion or reduced sentence on cross examination.

11. In 2010, Schutz filed a Motion for Enforcement of Plea Agreement, arguing that Respondent acted in bad faith by refusing to file a Rule 35 Motion to further reduce Schutz's sentence. Throughout the post-conviction proceedings in the *Schutz* matter, Respondent perpetuated the false statement that Schutz had testified before the Grand Jury, making no effort to correct the misrepresentation. In fact, as late as April 20, 2011, Respondent did file a Rule 35 Motion in Schutz's case. The motion reminded the Federal District Court that the government's original 2006 sentence recommendation had been premised in part on Schutz's Grand Jury testimony. He further acknowledged that Schutz "did testify post-judgment in the trial of Lashawn Johnson, although the information she provided had been given in a debriefing *and in grand jury testimony* prior to the original judgment."

12. On June 15, 2013, Johnson filed a motion for post-conviction relief (28 USC §2255), alleging that the government (Respondent) had failed to disclose potential impeachment information (*Giglio*) with respect to Schutz and two other witnesses. On June 24, 2014, pursuant to the Federal District Court's Order, the

///

government filed its Submission to Expand the Record.[1] In 2006, during the Johnson pretrial proceedings and for several years thereafter, Respondent did not produce to the defendant Schutz's sealed 5K1.1 Motion to Reduce Sentence, all of the FBI 302 reports of Schutz's debriefings or other documents.

13. On December 1, 2014, the Federal District Court issued a show cause order, noting that the government had "candidly" admitted that the prosecutor (Respondent) had not disclosed information "relevant to the jury's assessment of Schutz's credibility."[2] The Court further found that "the prosecutor's [Respondent's] concealment of these facts fell short of the level of candor required of prosecutors . . . and expected of those who represent the United States in this Court."[3]

14. The government stated:

> In this case, information concerning a 5K motion filed on behalf of a key government witness, Heather Schutz, was not disclosed to the defense. The defense did not know that such a motion had been filed or that Schutz's sentence had already been reduced based on that motion. Such evidence was both favorable and suppressed by the prosecution. The question, then, is whether it was material under the circumstances of this case. The United States acknowledges that i[t] was.[4]
>
> The government explained that Schutz had been a key witness against Johnson and had identified him at trail as her source of supply throughout the period of time she was dealing cocaine. But, she had

[1] *US v. Johnson*, USDC (MT) Cause No. CR 06-79, CR No.13-92-BLG-SEH, Doc. 188, Government's Submission to Expand the Record (Exhibit 1)
[2] Order, Doc. 193, p. 2. (Exhibit 2)
[3] *Id.* at 5.
[4] Government's Response to Order to Show Cause, Doc. 196, at p. 3. (Exhibit 3)

> told "two tales over the course of her involvement with law enforcement following her arrest."[5] Initially, she said that Johnson was not involved and someone else was her supplier. This discrepancy was brought out on cross-examination, but . . .
>
> The jury, then, was left in the classic position of deciding whether Schutz was telling the truth at trial or had told the truth in her initial debriefs. If the jury had cause to doubt Schutz's testimony at trial and decided her original story was true, it would have undermined the entire case against Johnson because such doubt would necessarily have impacted the jury's consideration of the corroborative testimony as well.
>
> Because her story changed, Schutz's credibility was of significant importance. Therefore, evidence that she had already received a significant reduction in her sentence was evidence the jury should have heard to allow it to determine whether she was being truthful when she debriefed or when testifying at trial. Such impeachment evidence was material as it could have "put the whole case in such a different light as to undermine confidence in the verdict."[6]

15. On February 12, 2015, the Federal District Court granted the government's unopposed motion to dismiss Johnson's case with prejudice.

Count One

16. By his conduct as outlined in paragraphs 1 through 15, Respondent violated Rules 3.3(a)(1) and 8.4(c) and/or 8.4(d), MRPC, as he made a false statement of fact to a tribunal and/or failed to correct a false statement of material fact previously made to the tribunal, which is prejudicial to the administration of justice.

///

---

[5] *Id.* at 4.
[6] *Id.* at 5 (citation omitted).

Count Two

17. By his conduct as outlined in paragraphs 1 through 15, Respondent violated Rule 3.8, MRPC, by failing to "make timely disclosures to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense...[.]"

WHEREFORE, the Office of Disciplinary Counsel prays:

1. That a Citation be issued to the Respondent, to which shall be attached a copy of the complaint, requiring Respondent, within twenty (20) days after service thereof, to file a written answer to the complaint;

2. That a formal hearing be had on the allegations of this complaint before an Adjudicatory Panel of the Commission;

3. That the Adjudicatory Panel of the Commission make a report of its findings and recommendations after a formal hearing to the Montana Supreme Court, and, in the event the Adjudicatory Panel finds the facts warrant disciplinary action and recommends discipline, that the Commission also recommend the nature and extent of appropriate disciplinary action, and,

4. For such other and further relief as deemed necessary and proper.

///

///

///

DATED this 25th day of April, 2018.

OFFICE OF DISCIPLINARY COUNSEL

By: _____

Michael W. Cotter
Chief Disciplinary Counsel